UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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JESSY BOUSTANY,

Plaintiff,

-against-

XYLEM INC. and GEORGE EL HANI, *Individually,*

Defendants.

---X

Case 1:15-cv-10023-GHW

DEFENDANT GEORGE EL-HANI'S MEMORANDUM OF LAW IN FURTHER SUPPORT OF HIS MOTION TO DISMISS COMPLAINT AND STAY DISCOVERY PENDING DETERMINATION OF THE MOTION

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I. ARGUMENT

A. This Action Must Be Dismissed As Against Defendant El-Hani

1. Service of Process was Defective Under Lebanese Law

The "Notice and Notification" filed in this case is defective under Lebanese law. It states that service was made on Mr. El Hani at "Baabda – Ghaleb Center – Third Floor"; that this is Mr. El-Hani's house; and that service was made on his housekeeper. No statement by a "designee of the Lebanese Civil Court of Appeal" (Plaintiff's Opp. At 2) can change the fact that this address is a commercial building (as a web search quickly shows), where Levica, Mr. El-Hani's company, was assigned a business address in August 2014, and that the address of Mr. El-Hani's home is nowhere referenced on the Notice and Notification. Because of this mistake, the Notice and Notification is defective.

The Court cannot "deem service upon Defendant El-Hani to be proper" pursuant to Rule 4(f)(3), which authorizes service on individuals in a foreign country "by other means not prohibited by international agreement, *as the court orders*." (Emphasis added). Courts have held that a plaintiff must obtain court approval *before* attempting alternative service pursuant to Rule 4(f)(3). *See FTC v. Pecon Software Ltd.*, 2013 U.S. Dist. LEXIS 111375, at *29 (S.D.N.Y. Aug. 7, 2013) (Rule 4(f)(3) requires prior approval of alternative means of service).[1]

[1] *Klein v. United States,* 278 F.R.D. 94, 97 (W.D.N.Y. 2011) (whether or not defendant had actual notice of action, plaintiff must obtain prior approval before proceeding to alternate means of service); *United States v. Machat,* 2009 U.S. Dist. LEXIS 87000, at *4 (S.D.N.Y. Sept. 21, 2009) (Koeltl, J.) ("Declaring prior service effective *nunc pro tunc* is not appropriate because Rule 4(f)(3) requires that the means of service be ordered by the Court and the Government's prior ineffectual efforts were not done pursuant to Court order."). *But see Exp-Imp. Bank of U.S. v. Asia Pulp & Paper Co., Ltd.,* 2005 U.S. Dist. LEXIS 8902, at *5 (S.D.N.Y. May 11, 2005) (authorizing service *nunc pro tunc* where prior service through overnight courier proved effective and defendants had thwarted plaintiff's prior extensive efforts to effect proper service through the manner contemplated by the parties' agreements).

2. This Court Lacks Personal Jurisdiction of Defendant El-Hani

Plaintiff has failed to carry her burden of demonstrating that a New York court may exercise jurisdiction over Defendant El-Hani under either CPLR §§ 301 or 302.[2]

a. There is no General Personal Jurisdiction

The CPLR § 301 "'doing business' standard requires more than just occasional or casual business activities within the state; rather, the defendant's conduct must be 'with a fair measure of permanence and continuity.'" *Twine v. Levy*, 746 F. Supp. 1202, 1204 (E.D.N.Y. 1990) (citation omitted); *see also Patel v. Patel,* 497 F. Supp. 2d 419, 424 (E.D.N.Y. 2007) ("[T]he traditional bases of jurisdiction covered by this rule include physical presence, domicile, consent, and corporate presence by virtue of a defendant 'doing business' in New York.") (citing Prof. David D. Siegel, 2001 Practice Commentaries C301:2-C301:10.) As the *Twine* court stated, "[t]he business conducted by the non-domiciliary must be sufficiently consistent and persistent to support the legal fiction that the non-domiciliary defendant is present within the state." *Id.* Even if Defendant El-Hani frequently reported (prior to April 28, 2014) via telephone or email to Xylem representatives in New York[3] as part of his job responsibilities (again, facts nowhere alleged in the complaint), he was not voluntarily availing himself "of the benefits and protections that accompany the privilege of conducting business in New York." *Twine,* 746 F. Supp. at 1204. Case after case has held that such telephone and email contacts by non-domiciliaries do not subject them to general personal jurisdiction in New York under CPLR § 301; nor do periodic meetings in New York establish jurisdiction. *See, e.g.,Hoffritz for Cutlery, Inc. v. Amajac, Ltd.,* 763 F.2d 55, 57-58 (2d Cir. 1985) (finding "extensive" correspondence regarding the parties' business relations and numerous visits to New York "insufficient . . . to make out even a prima facie case" for doing business jurisdiction); *Visual Footcare Techs., LLC v. Cfs Allied Health Educ., LLC,* 2014 US Dist. LEXIS 25487, at *13 (S.D.N.Y. Feb. 21, 2014) (finding four New York visits and "frequent" communications with New York representatives insufficient to establish CPLR § 301 jurisdiction).[4]

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[2] On the basis that the complaint does not contain a single allegation that Defendant El-Hani transacted business in New York, the Court can conclude that it does not have personal jurisdiction over Defendant El-Hani. *See, e.g., Gordon v. Invisible Children, Inc.,* 2015 U.S. Dist. LEXIS 129047, at *10 (S.D.N.Y. Sep. 24, 2015) (finding no personal general jurisdiction over non-domiciliary where the complaint pled "no facts demonstrating that [defendant] does business in New York …").

[3] Plaintiff claims that Defendant El-Hani failed to "identify the specifics or the two or three occasions" he was physically in New York. In actuality, Defendant El-Hani stated that the last time he was in New York in 2012 was to attend an ASHRAE conference. El-Hani Cert., ¶9.

Moreover, the time for determining whether a person is "doing business" in New York is when the complaint is filed, not when the alleged claim arose. *Pinto-Thomaz v. Cusi,* 2015 U.S. Dist. LEXIS 158518, at *13 (S.D.N.Y. Nov. 24, 2015) (finding no general personal jurisdiction where activity cited by plaintiff as supporting jurisdiction took place prior to the filing of the complaint). Thus, any involvement by Defendant El-Hani's with Xylem in New York prior to the filing of this lawsuit is irrelevant in determining CPLR § 301 jurisdiction.

b. There is No Long Arm Jurisdiction

Without a substantial New York connection, there is no basis to assert long-arm jurisdiction pursuant to CPLR § 302(a)(1). *Ferrante Equip. v. Lasker-Goldman,* 26 N.Y.2d 280, 284, 309 N.Y.S.2d 913 (1970) ("in order to sustain jurisdiction, there must be some transaction attributable to the one sought to be held *which occurs in New York"*) (emphasis added); *Etra v. Matta*, 61 N.Y.2d

[4] *See also Kinetic Instruments, Inc. v. Lares*, 802 F. Supp. 976 (S.D.N.Y. 1992) (defendant's periodic visits to New York did not satisfy "doing business" standard); *Twine,* 746 F. Supp. at 1205 (phone calls and letters to persons in New York does not establish a pattern of continuous business activity "that would even approach the threshold of doing business for the purposes of CPLR 301"); *Alexander & Alexander v. Donald F. Muldoon & Co.,* 685 F. Supp. 346, 352 (S.D.N.Y. 1988) (daily phone calls to New York and monthly visits did not constitute doing business in New York).

455, 474 N.Y.S.2d 687 (1984) (no long-arm jurisdiction over Massachusetts physician who acted as a medical consultant for a New Yorker and sent telephonic and written communications to patient's primary physicians, who treated patient in New York).

New York courts have held that, "at a minimum, a defendant who 'transacts business' in New York must 'purposefully avail itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws.'" *McKee Elec. Co. v. Rauland-Borg Corp.,* 20 N.Y.2d 377, 381-382, 283 N.Y.S.2d 34 (1967) (citations omitted). New York courts have also stated that the requisite minimum contacts must provide a fair warning to the defendant of a possibility of being subject to New York courts. *Spencer Trask Ventures, Inc. v. Archos S.A.,* 2002 U.S. Dist. LEXIS 4396, at *12 (S.D.N.Y. Mar. 18, 2002) (rejecting plaintiff's arguments that defendant was subject to long-arm jurisdiction because it had entered into a contract with the plaintiff in New York, visited New York, and made and participated in telephone calls to New York about the contract). Defendant El-Hani did not purposefully avail himself of the protections and benefits of New York law if he answered questions posed by Xylem representatives in New York regarding alleged behavior outside of New York of Lebanese employees employed by a Xylem German subsidiary.

Plaintiff's allegation (first raised in opposition papers) that Defendant El-Hani purposefully availed himself of New York law because he was "required to acknowledge and abide by [Xylem's] Code of Conduct" (Opp. Br. at 6) does not help her. First, there is no evidence that Defendant El-Hani did, in fact, "acknowledge and abide" this document. Second, even if he had, the Code of Conduct does not contain a forum selection clause designating New York courts as a proper forum for employment disputes or even adopting New York law as relevant to determining employment disputes between Lebanese employees. It does not even state that the Code of Conduct is governed by New York law.

Of the many cases cited by Plaintiff on this point, not a single one is close to being on point,[5] and several hurt Plaintiff's position.[6] Indeed, in each case where long-arm jurisdiction was found appropriate, New York, unlike here, had a substantial connection to the dispute. In

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[5] Some of the inapposite case cited by Plaintiff which found long-arm jurisdiction on the basis of substantial New York connections are: *SAS Group, Inc. v. Worldwide Investigations, Inc.,* 245 F. Supp. 2d 543, 548 (S.D.N.Y. 2002) (New York long-arm jurisdiction over breach of contract claim where essential discussions regarding contract took place in New York); *Treeline Inv. Partners, LP v. Koren,* 2007 U.S. Dist. LEXIS 47748, at *8 (S.D.N.Y. July 3, 2007) (long-arm jurisdiction established where defendant engaged in purposeful activity in New York by entering into sales contracts with a New York resident, and making at least one trip to New York to negotiate the contract); *Moskowitz v. La Suisse Societe D'Assurances sur la Vie,* 282 F.R.D. 54, 56 (S.D.N.Y. 2003) (defendant sold insurance policies in New York and earned substantial commissions there, travelled repeatedly to New York, and advertised policies in New York newspapers); *Citigroup Inc. v. City Holding Co.,* 97 F. Supp. 2d 549, 564 (S.D.N.Y. 2000) (defendant engaged in direct mail solicitation of New York business, used New York companies to record mortgages and perfect liens on real property located in New York which secured the loan contracts); *LaChapelle v. Torres,* 2014 U.S. Dist. LEXIS 26128, at *34 (S.D.N.Y. 2014) (defendant transacted business in New York and purposefully availed himself of the New York forum where he had a years-long relationship with FTC, a New York corporation, owned New York property, was an FTC employee for roughly half a year, continued to maintain a relationship with FTC and to perform financial services for FTC after leaving its employment, and lived in New York for roughly a year while performing services for FTC on a full-time basis, albeit in the absence of a formal employment agreement).

[6] Some of the inapposite cases Plaintiff cites that harm her position are: *Bank Brussels Lambert v. Fiddler Gonzalez & Rodriguez,* 171 F.3d 779, 787 (2d Cir. 1999) (no personal jurisdiction under CPLR § 302(a)(1) of Puerto Rican law firm that supplied legal opinion regarding sufficiency of collateral for multi-million dollar bank loan that closed in New York; law firm's communications with New York banks took place from Puerto Rico); *Best Van Lines, Inc. v. Walker,* 490 F.3d 239, 247 n. 10 (2d Cir. 2007) (making defamatory statements outside New York about New York citizens did not, without more, provide a basis for jurisdiction, even if the statements were published in media accessible to New York readers).

Launer v. Buena Vista Winery, Inc., 916 F. Supp. 204, 209-10 (E.D.N.Y. 1996), for example, plaintiff maintained his office in New York, was subjected to discriminatory comments in New York, and was terminated at his New York office. Similarly, in *International Healthcare Exchange, Inc. v. Global Healthcare Exchange, LLC,* 470 F. Supp. 2d 345, 360 (S.D.N.Y. 2007), the plaintiff was hired to work out of her New York City home office on a permanent basis and alleged that all of the work assignments she received during her three-month employment constituted repeated instances of disparate treatment on the basis of gender. In contrast, even assuming all of Plaintiff's allegations are true, she worked in Lebanon, suffered no alleged discriminatory treatment in New York, and she was terminated from a job in Lebanon.

c. The Exercise of Jurisdiction Over Defendant El-Hani Would Offend Traditional Notions of Fair Play and Substantial Justice

Plaintiff incorrectly argues that, "[p]ursuing this litigation in New York will have a minimum burden on Defendant El-Hani." She claims that El-Hani may appear "via video" for his deposition in Lebanon, ignoring the fact that Defendant El-Hani's U.S. lawyer would have travel to Lebanon to prepare and defend him, and that there is a seven hour time difference between New York and Lebanon thus making a seven-plus hour deposition (permitted under the rules, and normal in a multi-party case) a logistical nightmare. She also says, without any support in the complaint, that Mr. El-Hani is "an individual of means" and that traveling to New York "would not be a financial burden" for him. Even if that statement were true, which it is not, a Lebanese defendant could reasonably expect to spend four to five days traveling to New York, preparing for his deposition, attending the deposition, and returning to Lebanon – a substantial time burden for Defendant El-Hani, who is running a company in Lebanon. If the matter went to trial, Defendant El-Hani would be forced to make this trip at least twice.

Plaintiff erroneously argues that "New York has a strong interest in adjudicating this dispute" because "Defendant El-Hani worked for Defendant Xylem," and "many of the employees who Plaintiff complained to about the discrimination reside in New York." (Opp. Br. at 8.) However, Defendant El-Hani, like Plaintiff, did not work for Defendant Xylem. Also, there is no evidence that Xylem employees live in New York, as opposed to Connecticut or New Jersey, but even if they did, New York would not have any interest in this litigation involving Lebanese employment practices based on the residence of Human Resources employees.

Plaintiff argues, without legal support, that she "will have a difficult time recovering in the Lebanese court system." Article 18 of Plaintiff's and Defendant El-Hani's employment agreements require all disputes related to their employment to be "settled by the labor courts in Beirut." El-Hani Ex. B-1 and B-2. Plaintiff and Defendant El-Hani each reside in the Middle East. While Plaintiff concededly has an interest in obtaining convenient and effective relief, she has failed to demonstrate that she cannot obtain such relief in the forum she agreed to litigate employments disputes and where she has already commenced proceedings against Defendants.

3. Plaintiff Has Failed to State a Cause of Action Against Defendant El-Hani Under New York Executive Law § 296

Plaintiff argues that she can prove discriminatory impact in New York because "Plaintiff was in constant communication with individuals in New York" and "Plaintiff's [sic] investigation and the decision to terminate her were made in New York." (Opp. Br. at 11.) Plaintiff's communications to New York do not cause an impact in New York; Xylem's alleged investigation in New York did not cause an impact in New York; and the termination decision did not cause an impact in New York. Indeed, in *Hoffman v. Parade Publishing,* 15 N.Y.3d 285, 292, 907 N.Y.S.2d 145 (2010), the Court of Appeals rejected the argument that a decision arrived at in New York to terminate a non-resident causes an impact in New York. *See also*

Benham v. eCommission Solutions, LLC, 118 A.D.3d 605, 606, 989 N.Y.S.2d 20 (1st[t] Dep't 2014) ("Because the alleged conduct occurred while plaintiff was physically situated outside of New York, none of her concrete allegations of harassing behavior or other discriminatory conduct had the 'impact' on plaintiff in New York required to support claims under the State and City [Human Rights Laws]."); *Ghorpade v. MetLife, Inc.,* 2014 U.S. Dist. LEXIS 172408, at *7 (S.D.N.Y. Dec. 12, 2014) (MetLife employee working in India when terminated not entitled to protections of NYSHRL or NYCHRL because impact not felt in New York); *EEOC v. Bloomberg, L.P.,* 967 F. Supp. 2d 816, 865 (S.D.N.Y. 2013) (evidence that adverse actions took place in New York is insufficient to demonstrate that discriminatory events had impact in New York); *Doner-Hendrick v. N.Y. Inst. of Tech.*, 2011 WL 2652460, at *8 (S.D.N.Y. July 6, 2011) (dismissing plaintiff's claims under NYSHRL because plaintiff could not show the required "impact" in New York); *cf. Germano v. Cornell Univ.,* 2005 U.S. Dist. LEXIS, at *14 (S.D.N.Y. Aug. 17, 2005) (dismissing NYCHRL claim because "impact" of termination was felt in Long Island, where plaintiff was employed, and not in New York City, where discriminatory conduct allegedly occurred.).

4. Plaintiff is Barred From Asserting Claims Against Defendant El-Hani

Plaintiff admits that she executed an employment agreement requiring all disputes related to employment to be "settled by the labor courts in Beirut." El-Hani Ex. B-1 and B-2. She supplies no support for her argument that this agreement has been "succeeded" by New York law. This clause is enforceable, and compels the dismissal of this lawsuit, as does Plaintiff's agreement executed in April 2014 in which she expressly agreed not to "initiate any claim and/or legal action in any manner whatsoever against Mr. George El-Hani … particularly in light of his having ended his services with the Company, which addresses the issue." El-Hani Ex. B.

B. Pending this Court's Determination of this Motion, All Discovery Should Be Stayed

Plaintiff makes no effort to distinguish the cases cited in Defendant El-Hani's opening brief concerning the continuation of the stay of discovery pending determination of this dispositive motion,[7] or address the factors that a court should consider in deciding whether to grant a stay of discovery in the face of a dispositive motion, such as the burden of responding to the contemplated discovery and the strength of the dispositive motion forming the basis for the stay request. *Chesney*, 236 F.R.D. at 115; *Spencer Trask Software and Info. Servs., LLC v. Rpost Int'l Ltd.,* 206 F.R.D. 367, 368 (S.D.N.Y. 2002). Instead, Plaintiff says the Court should exercise its discretion and order jurisdictional discovery, arguing that she has "made a sufficient start toward establishing personal jurisdiction." (Opp. Br. at 11; citations omitted.) The short answer is that Plaintiff has shown no basis for the assertion of New York jurisdiction over Defendant El-Hani for the reasons discussed above, and therefore the Court should deny the request to take

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[7] *See Boelter v. Hearst Communs., Inc.,* 2016 U.S. Dist. LEXIS 12322, at *6 (S.D.N.Y. Jan. 28, 2016) (granting stay of discovery where defendant had moved for dismissal of complaint and court found "ordering discovery to proceed at this time would result in an excessive burden on Defendant."); *Chesney v. Valley Stream Union Free Sch. Dist.,* 236 F.R.D. 113, 115 (E.D.N.Y. 2006) (staying discovery for "good cause" where there were substantial issues raised as to viability of claims in pending motions); *Petrus v. Bowen,* 833 F.2d 581, 583 (5th Cir. 1987) (same); *Anti-Monopoly, Inc. v. Hasbro, Inc.,* 1996 U.S. Dist. LEXIS 2684, at *6 (S.D.N.Y. March 7, 1996); *Anderson v. United States Attorneys Office,* 1992 WL 159186, at *1 (D.D.C. June 19, 1992); *United States v. Cnty. Of Nassau*, 188 F.R.D. 187, 188-89 (E.D.N.Y. 1999) (granting stay of discovery during pendency of a motion to dismiss where the "interests of fairness, economy and efficiency . . . favor[ed] the issuance of a stay of discovery"); *Chavous v. District of Columbia Fin. Responsibility & Mgmt. Assistance Auth.,* 201 F.R.D. 1, 2 (D.D.C. 2001) ("A stay of discovery pending the determination of a dispositive motion is an eminently logical means to prevent wasting the time and effort of all concerned, and to make the most efficient use of judicial resources.").

"jurisdictional discovery." *See Scott v. ProClaim Am., Inc.*, 2015 U.S. Dist. LEXIS, at *12 (E.D.N.Y. June 22, 2015) (denying request for jurisdictional discovery where plaintiff had failed to make a prima facie showing of jurisdiction and there was no dispute as to facts material to the determination of jurisdiction.).

II. CONCLUSION

For the foregoing reasons and those previously set forth, Defendant El-Hani respectfully requests that this Court dismiss the Complaint as against him, continue the stay of discovery during the pendency of this dismissal motion, and grant such other and further relief as the Court deems just and proper.

Dated: New York, New York
May 9, 2016

STEWART OCCHIPINTI, LLP

By:____________________________
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